DISSENTING STATEMENT
OF COMMISSIONER MICHAEL J. COPPS

In the Matter of Inquiry Concerning High-Speed Access to the Internet
Over Cable and Other Facilities
Internet Over Cable Declaratory Order Proceeding
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities

GN No. 00-185

Just one month ago, the Commission adopted a Notice of Proposed Rulemaking regarding the classification of broadband services delivered by wireline providers ("*Wireline Broadband NPRM"*). I dissented from that Notice and expressed concern that some might read that *Notice* and conclude that the Commission had a predetermined agenda to deregulate dominant providers in the market. The spate of newspaper stories and magazine articles in the intervening month bears out the concern that I expressed. Many analysts and observers have concluded exactly that. Today, I am afraid the Commission reinforces these conclusions. After just four weeks, and before comments have even been received in the *Wireline Broadband* proceeding, we embark on a very similar path for cable modem services, only this time we leapfrog from a generalized Notice of Inquiry to an extraordinarily far-reaching Declaratory Ruling.

I cannot support either the timing of the Declaratory Ruling or its conclusions, which create dangerous uncertainty in the growing market for cable broadband services. I sympathize with the concerns of cable system operators, local franchising authorities, and others about the lack of regulatory clarity in this area. But this Declaratory Ruling does not provide the certainty sought by these entities, instead placing cable modem services into the regulatory uncertainty of Title I.

The decision the Commission will make today strays far afield from the regulatory construct established by Congress. Congress provided statutory frameworks for cable and for telecommunications carriers under Title VI and Title II, respectively. The statute makes clear that, to the extent that a cable operator serves as a common carrier subject to the provisions of Title II, the regulations prescribed by Title VI do not apply. Similarly, a telecommunications carrier generally regulated under Title II is subject to the obligations in Title VI to the extent it is providing a cable service. So the statutory provisions accommodate cable system operators' delivery of new or hybrid services, even where those services may not fit neatly into the existing regulatory classifications. For example, there is widespread agreement that telephony provided over the cable plant is subject to Title II regulation. A powerful case has been made that cable modem services should also be subject to Title II.

Video services provided over the telephone system are subject to Title VI. Were cable modem services similarly subject to Title VI, provisions governing general

franchising authority, the ability of local authorities to assess franchise fees, and the cap on such fees would continue to apply.

But under the classification scheme adopted today, the categorizations become much more difficult. For example, is IP telephony subject to Title II as is cable telephony, or Title I, as is cable modem service? Is video streaming over cable modem service subject to Title VI as are traditional video services delivered by cable systems, or is that too now subject to the vagaries of Title I?

The Ruling will force cable modem services into the generally deregulated information services category, subject only to the Commission's ancillary jurisdiction of Title I. I cannot conceive that Congress intended to remove from its statutory framework core communications services such as the one at issue in this proceeding. I cannot imagine that it envisioned its statutory handiwork being made obsolete by a new service offering.

But make no mistake – today's decision places these services outside any viable and predictable regulatory framework. First, it concludes that, as a statutory matter, cable modem services are not cable services. Next, it concludes that cable operators providing cable modem services over their own facilities are not offering telecommunications services because subscribers are purchasing only information services. This is the same forced analysis the Commission tentatively reached in the *Wireline Broadband NPRM.* Those who conclude that the Commission has now resolved that particular proceeding after just one month may be pardoned.

Next, the Commission addresses the situation in which a cable operator offers its cable modem service as an input provided to an unaffiliated ISP. Although the decision concludes that the record provides insufficient information to determine whether cable operators are offering pure transmission services to ISPs, the majority determines – with scant analysis – that it expects that any cable operators that offer pure telecommunications in the future would be offering only private carriage. Doesn't insufficient information mean that the Commission should refrain from broad pronouncements until it can acquire the necessary data?

Finally, the Commission dismisses out of hand the argument raised in the record that the Commission's current rules by their terms require cable operators to offer access to unaffiliated Internet providers. These rules require carriers that offer transmission capacity using wire or radio to offer transmission services to competing information service providers.[1] This policy has been key to the development of a competitive information services market. The Ruling, however, concludes with scant analysis that these access requirements only apply to wireline telephone companies.

The Ruling seems uneasy with its own conclusions. Just in case we are wrong, and access requirements *were* to apply, they are waived, on the Commission's own

[1] *See* 47 U.S.C. § 153(10). This broad definition of common carrier is one reason that Congress expressly exempted cable services regulated under Title VI from regulation as a common carrier. 47 U.S.C. § 541(c).

motion, with neither notice nor comment. And if even ***that*** stretch somehow fails to get the point across, the *NPRM* adopted today also takes steps to ensure that these services remain deregulated in the face of any court opinion to the contrary. Even if cable modem services are found by the courts to be subject to regulation, the Commission would forbear from enforcing those obligations. So, in this analysis the majority makes a determination, but just in case it got the determination wrong, it waives the rule it determined did not apply, and, should the courts disagree, we simply forbear from enforcing the rule. That's a far distance down the road from the simple NOI we are working from, isn't it?

Once the Ruling has reached its desired result to remove these services from regulatory requirements, we are then told not to worry – the Commission can build its own regulatory framework under its ancillary jurisdiction. Years ago, when I worked on Capitol Hill, we used to worry about legislation on an appropriations bill. Down here, I'm learning that I have to look out for legislation on an NPRM.

The NPRM adopted by the Commission today raises the further question – also addressed in a tentative conclusion in the *Wireline Broadband NPRM* – as to whether cable modem services should be subject to an access requirement. The majority notes that certain cable system operators have recently begun to enter into carriage agreements with unaffiliated ISPs. While this progress is worth noting, I would also note that such agreements are quite new, are generally limited to the largest cable systems, and are generally offered to only one or two unaffiliated ISPs. Thus, while there has been some promising movement in the direction of multiple ISP access, the progress has been slow and the course is far from set. The effect of this deliberate pace has been to deny many consumers access to more than one ISP – a circumstance that recently proved a near-disaster when the one ISP carried by some of the nation's largest cable systems abruptly closed its doors.

I am pleased that the majority recognizes in theory the ability of the Commission to impose an access requirement even under its reading of the statute. I am not, however, sanguine that we will ever get there in practice. I do believe that *some* access requirement is necessary in order to ensure that consumers have choices of ISPs. It strikes me as ironic that without such a requirement the Internet – which grew up on openness – may become the province of dominant carriers, able to limit access to their system to all but their own ISPs. I would like to hear from a multiplicity of stakeholders what they believe the nature of a multiple ISP requirement should be, how it could be implemented, and what other regulatory or public interest implications would accompany the imposition of such a requirement.

Today we take a gigantic leap down the road of removing core communications services from the statutory frameworks established by Congress, substituting our own judgment for that of Congress and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another. Last month I remarked that in our *Wireline Broadband* proceeding, we were out-driving the range of our headlights. Today I think we are out-flying the range of our most advanced radar.

Let me repeat my serious misgivings about not just the propriety, but the wisdom of the Commission proceeding directly from a general Notice of Inquiry to the adoption of such far-reaching conclusions in so important an area of national policy. How America deploys broadband is the central infrastructure challenge our country faces. It is a public policy matter of enormous implications. How we get it done affects not only how many megabytes of information our computers can download, but what kinds of options consumers will be able to choose from, what kinds of protections they will have against misguided or fraudulent business practices, and what kinds of opportunities will be available to those in our society who do not share fully in our general prosperity. With so much at stake, I would have hoped for a little more modesty and measured pace on our part.